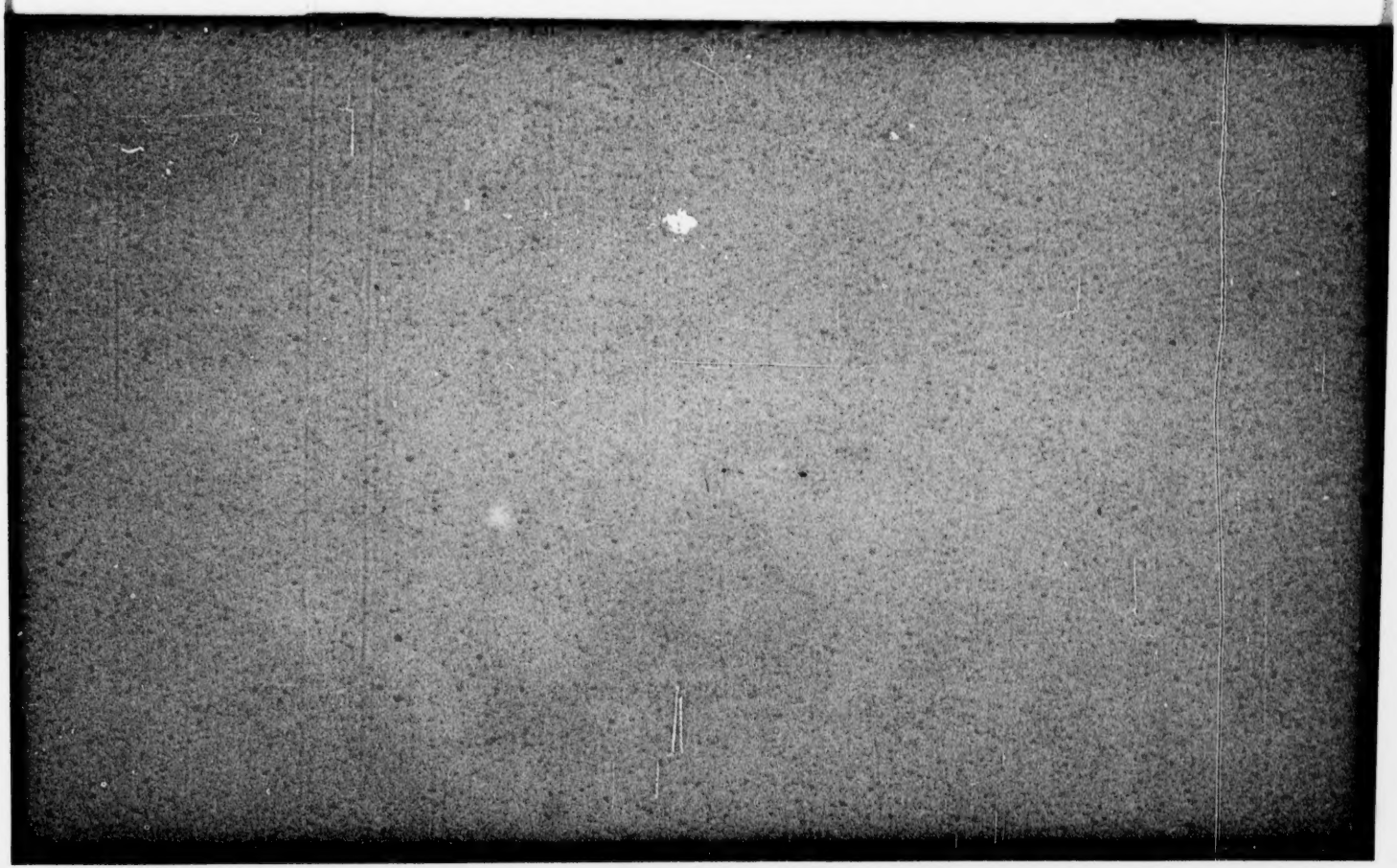

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73—1963

FREDERICK F. PORDUM,

Petitioner,

against

BOARD OF REGENTS OF THE STATE OF NEW YORK and EWALD B. NYQUIST, THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, and THE CITY SCHOOL DISTRICT OF THE CITY OF LACKAWANNA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX IN OPPOSITION FOR RESPONDENTS BOARD OF REGENTS & COMMISSIONER OF EDUCATION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BOARD OF REGENTS & COMMISSIONER OF EDUCATION

Respondents Board of Regents of the State of New York and Ewald B. Nyquist, Commissioner of Education of the State of New York [hereinafter state respondents] oppose the petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit, dated February 20, 1974. That decision affirmed the opinion and order of the United States District Court for the Northern District of New York, dated April 26, 1973, which denied petitioner's application to convene a three-judge court and dismissed the complaint for want of a substantial federal question.

Opinions Below

The opinion of the Court of Appeals is reported at 491 F. 2d 1281 and reproduced in Appendix A to the petition at pp. 39-51. The opinion of the District Court is reported at 344 F. Supp. 964 and is reproduced in Appendix B to the petition at pp. 52-59.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 20, 1974. In an order dated April 4, 1974 that Court denied the petition for a rehearing en banc. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Question Presented

1. Has petitioner presented any factor which would motivate the exercise of this Court's certiorari jurisdiction?

State Statute Involved

New York Education Law:

"§ 305. General powers and duties.

The commissioner of education is hereby charged with the following powers and duties:

• • •

7. He may annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher by any authority whatever or declare any diploma issued by a state teachers college and state colleges for teachers ineffective and null as a qualification to teach a common school within this state, and he may

reconsider and reverse his action in any such matter.
§ 308. Other powers.

• • •

The commissioner of education shall also have power and it shall be his duty to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city. He shall possess the power and authority to likewise enforce any rule or direction of the regents."

Statement of the Case

This action was commenced in March of 1973 pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. Petitioner challenged the validity of Section 305(7) of the New York Education Law, which gives the Commissioner of Education the power to annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher. Since petitioner sought to enjoin the operation of this statute, he sought the convening of a three-judge court.

Petitioner is a tenured teacher in the Lackawanna, New York school district. He holds a New York State teaching certificate issued to him by the Commissioner of Education. In 1967 the school district granted him a two-year leave of absence. The leave was subsequently extended for an additional three years, to expire on January 1, 1973.

In June of 1971, while petitioner was a member of the Erie County Legislature, he was convicted in the United States District Court for the Western District of New York of the crime of conspiracy to promote and facilitate the promotion of bribery, a felony under 18 U.S.C. § 371. He was sentenced to a term of imprisonment of three years.

On December 22, 1972 petitioner was released from prison on parole. On December 29, 1972 he wrote to the school district stating that his leave of absence was about to expire and that he was ready to resume his duties as a teacher. The school district replied by a letter dated January 24, 1973 informing him that he was assigned to Wilson Elementary School, effective February 1, 1973, the beginning of the new school term.

On January 24, 1973, upon learning of this assignment, the Commissioner of Education wrote to petitioner ordering him to show cause on February 15, 1973 at a hearing why his teaching certificate should not be revoked, pursuant to § 305(7) of the Education Law, as a consequence of the conviction which created substantial doubt as to his fitness to teach in the public schools. A separate letter to plaintiff's counsel stated that the hearing would be conducted before a hearing officer in accordance with "established administrative procedures"; specifically, that petitioner would be afforded the opportunity to present evidence in his behalf and to cross-examine witnesses; and that a stenographer would be present to prepare a transcript of the proceedings.

In a further separate letter dated January 24, 1973 the Commissioner ordered the school district not to re-employ petitioner pending the outcome of the February 15 hearing. The school district advised petitioner of this fact on January 30, 1973.

Petitioner refused to comply with the hearing procedure. At his request the hearing was adjourned until March 30, 1973. On March 8, he commenced this action in the District Court. The Commissioner is and has been at all times prepared to go forward with the hearing. The school district asserted that it was prepared to immediately re-employ petitioner, without a hearing, despite his conviction and parole status. Although nominally a defendant in

the action, the school district joined in petitioner's application for immediate reinstatement. The school district has not appeared in any court proceeding since that time.

Before the District Court, petitioner contended that Section 305(7) violated his right to due process because it was vague and indefinite and procedurally defective; violated the equal protection clause; and was overbroad and potentially chilling of his First Amendment rights.* Applying the standards of *Goosby* v. *Osser*, 409 U.S. 512 (1973), the District Court concluded that petitioner's claims were either foreclosed by previous decisions of this Court or obviously without merit and refused to convene a three-judge court. Since the complaint failed to present a substantial federal question which would support the Court's jurisdiction under 28 U.S.C. § 1343(3), the complaint was dismissed. The Court of Appeals affirmed.

Reasons for Denying the Petition for Certiorari

Petitioner has failed to present any factor which would motivate the exercise of this Court certiorari jurisdiction.

Since the courts below found petitioner's claims either foreclosed by previous decisions of this Court or obviously without merit, *a fortiori* they failed to present a substantial federal question, and the complaint was dismissed without the necessity of convening a three-judge court. *Goosby* v. *Osser, supra; Mitchell* v. *Donovan*, 398 U.S. 427 (1970); *Ex Parte Poresky*, 290 U.S. 30 (1933). Petitioner now asserts that this decision was erroneous. On the contrary, the state respondents suggest that petitioner's contentions are frivolous and fail to suggest any factor which

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* Petitioner has not pursued his First Amendment claim in this Court.

would motivate the exercise of this Court's certiorari jurisdiction.

a. Since petitioner received notice of the charge against him and was provided with an opportunity for a hearing, with statutory provision for judicial review from an unsatisfactory ruling (New York Civil Practice Law and Rules, Article 78; *Matter of Lynch* v. *Nyquist*, 34 N Y 2d 588 [1974], *affg.* 41 A D 2d 363 [3rd Dept. 1973]), his contention that Section 305(7) fails to spell out this administrative procedure in detail is frivolous and presents no basis for certiorari review.* Actually, such procedure has always been accorded when the annulment of certification or other disciplinary procedure is involved (A. 56-57).** Moreover, since the decision below, the Commissioner has adopted a regulation setting forth the procedure to be used in certification annulment proceedings, including situations wherein a teacher has been convicted of a crime (reproduced in the appendix to this brief, effective September 1, 1974). The suggestion that the Commissioner might not accord to others similarly situated the same due process protection offered to petitioner is refuted by this regulation, apart from petitioner's obvious lack of standing to raise the issue. E.g., *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166 (1972).

b. Since this Court as recently as *Arnett* v. *Kennedy*, —— U.S. ——, 94 S. Ct. 1633 (1974), has had occasion to discuss and approve statutory language applicable to the

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* Whether as a matter of due process a hearing is required when a teacher is convicted of a crime of moral turpitude, as here, is itself questionable. *Purifoy* v. *State Board of Education*, 30 Cal. App. 3d 187, 196 Cal. Rptr. 201 (Ct. of App., First District 1973). Here the State does provide a hearing, as was offered to petitioner.

** See also *Matter of Quinn*, 67 N.Y. St. Dept. Rep. 7 (1946); *Matter of Hoffman*, 39 N.Y. St. Dept. Rep. 346 (1930); *Matter of Pryor*, 38 N.Y. St. Dept. Rep. 115 (1928).

removal of government employees, similar to the language of the statute challenged herein ("upon cause shown to his [the Commissioner's] satisfaction"), no occasion for further review is presented in this case. Apart from *Arnett*, as the courts below noted, this Court has on numerous occasions upheld statutory language similar to that of Section 305(7). *Beilan* v. *Board of Education*, 357 U.S. 399 (1958) (discharge of a teacher for "incompetency"); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938) (termination of a teacher for "incompetency, insubordination, neglect of duty, immorality . . . or other good or just cause"); *Lehman* v. *Board of Accountancy*, 263 U.S. 394 (1923) (cancellation of an accountant's certificate "for any unprofessional conduct of the holder of such certificate, or for other sufficient cause"). Cf. *Perry* v. *Sinderman*, 408 U.S. 593 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

Petitioner's reliance on *Parker* v. *Levy*, —— U.S.——, 42 U.S.L.W. 4979 (June 18, 1974) is misplaced. There this Court held that provisions proscribing "conduct unbecoming to an officer" and "all disorders and neglect to the prejudice of good order and discipline in the armed forces" were not vague when interpreted in light of custom and usage. 42 U.S.L.W. at 4982-84. This decision directly supports the state respondents' contention that custom and usage, as well as common sense, compel the conclusion that a teacher is chargeable with the knowledge that a felony conviction may be "cause" for the annulment of his teaching certification. Since petitioner's conduct fell within the "hard core" of prohibited conduct for teachers, he lacks standing to attack the statute as it might be applied to others. *Parker*, 42 U.S.L.W. at 4986; *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 578-80 (1973); *Broadrick* v. *Oklahoma*, *supra* at 608.

c. Similarly, the equal protection argument based on state statutes which spell out misconduct definitions and disciplinary procedures for other professions different

than those set forth for teachers is frivolous. Petitioner's argument rests on the assumed equivalence between teaching and other state regulated professions. The assumption is clearly unwarranted. See *Tigner* v. *Texas,* 310 U.S. 141, 146-47 (1940). Education is "perhaps the most important function of state and local government." *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954). The Court of Appeals accordingly recognized that

> ". . . the teaching profession differs from these other professions in many respects, including the special vulnerability of the client population, the high duty of care owed by the state to that group, and the unique responsibility which the state has to provide an effective system of education." (citing Art. 11 § 1 of the New York State Constitution) (A. 48).

See *Beilan* v. *Board of Education, supra* at 405; *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952); *In re Grossman,* 127 N.J. Super. 13, 316 A. 2d 39, 48-49 (App. Div. 1974).

The principle that a state may deal differently with different groups so long as the distinctions drawn are rationally related to a legitimate state interest is well-established. E.g., *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973); *Lindsay* v. *Normet,* 405 U.S. 56, 70 (1972); *Richardson* v. *Belcher,* 404 U.S. 78, 81-84 (1971); *McGowan* v. *Maryland,* 366 U. S. 420, 425-27 (1961).

4. The power to suspend petitioner pending his re-employment by the school district is supported by state statute. New York Education Law §§ 305(7), 308. Indeed it would have been anomalous and perhaps condemnatory had the Commissioner failed to take temporary action to prevent the re-employment of a convicted felon as an elementary school teacher, without so much as a hearing. The Court of Appeals rejected petitioner's claim that he was entitled to a full evidentiary hearing before he could be

suspended (A. 42-45). This is so* apart from this Court's decision in *Arnett, supra,* upholding termination with an opportunity for a subsequent hearing.**

As the various opinions in *Arnett* indicate, the purpose of preliminary due process is the establishment of probable cause for the charges, the intention of which is the avoidance of mistakes in fact. See also *Morrissey* v. *Brewer,* 408 U.S. 471, 490 (1973). No such risk of error was attendant in petitioner's situation. The uncontested fact of petitioner's felony conviction was in and of itself probable cause for a charge that his fitness to teach was in question. Since petitioner was offered a reasonably immediate hearing based on unquestionable probable cause, there is no basis for certiorari review of his claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, August 20, 1974.

Respectfully submitted,

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* E.g., *Weiss* v. *O'Hara,* —— F.Supp. ——, 73 Civ. 264 (S.D. N.Y.) (three-judge court) (May 18, 1973), upholding the suspension procedures of Section 75 of the New York Civil Service Law.

** In *Arnett* a government employee was *removed* from his job. In the instant case petitioner was *temporarily suspended* from *re-employment.*